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No. 159

1968

IN THE

Supreme Court of the United States

RUTH E. BIDDLE, *Administratrix, Appellant*

v.

IDA M. BOWSER, *et al., Appellees*

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. _____

RUTH E. BIDDLE, *Administratrix, Appellant*

v.

IDA M. BOWSER, *et al., Appellees*

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Ohio, dismissing her appeal, *sua sponte*, entered on December 13, 1967; and the order denying her motion for rehearing, entered on January 17, 1968; and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Ohio, denying appellant's motion for a rehearing is reported in the Advance Sheets for Ohio Opinions, Second Series (Rehearing Docket), Volume 42, Number 2, Page 14, of January 22, 1968. Copies of the mandate dismissing the appeal and the order denying the rehearing are attached hereto as Appendix A.

JURISDICTION

This suit was brought under Ohio Sup. Ct. R. 11 (4). The motion for rehearing in that Court was brought under Ohio Sup. Ct. R. IX (1). The judgment of the Supreme Court of Ohio was entered on January 17, 1968, and notice of appeal was filed in the Court of Appeals of Montgomery County, Ohio, the court of record, March 29, 1968. The jurisdiction of the Supreme Court to review this decision by appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Barbier* v. *Connolly,* 113 U.S. 27, 28 L.ed 923 (1884); *Jordan* v. *Massachusetts,* 225 U.S. 167, 56 L.ed 1083 (1911); *Standard Oil Company* v. *Missouri,* 224 U.S. 270 (1911); *Throckmorton* v. *Holt,* 180 U.S. 552, 21 S.Ct. 474 (1900); *Whitfield* v. *Ohio,* 297 U.S. 431 (1935).

QUESTIONS PRESENTED

1. Is a litigant denied the due process of law when a lower court resolves a factual dispute adversely to him, based on that court's refusal to give any weight to substantial evidence of a scientific analysis of handwriting, directly bearing on that factual issue?

2. Is a litigant denied equal protection of the laws when the constitution of the State of Ohio provides for the use of scientific handwriting evidence to resolve a question of

forgery in criminal matters, but gives no weight to this type of evidence when a question of forgery arises in a civil matter?

3. When it is in the public interest of the citizens of the State of Ohio to have prompt adjudication of conflicting claims to property within the state, and certainty of title ownership of real property is desirable, for the same reason, has a common pleas court of Ohio denied due process of law to a litigant when, as a result of its delay in adjudicating conflicting claims to the property, the title is held in abeyance for a period of twenty-three years?

STATUTES INVOLVED

Ohio Const. art. 11, §39 and art. 1, §16; Ohio Rev. Code, §2317.36, §2505.071 and §2945.40 (Third Edition, 1964); are set forth in Appendix B hereto.

STATEMENT

On April 1, 1914, Jonas Priser died, survived by his widow and son, John, leaving farm property, in which his widow, Lydia Priser, retained a dower interest. On April 5, 1934, Lydia Priser died, releasing the dower interest in the property, located in Montgomery County, Perry Township, Ohio. On that date, therefore, John Priser, as the only heir at law of his mother, inherited real property by intestate succession, described as follows:

> "(a). Parcel 1, in the Township of Perry, and being a part of the west half of the southwest quarter of Section Numbered 21, Range 4, Township 5; and (b). Parcel 2, in the Township of Perry, and being the west half of the southwest quarter of Section 21, Town 5, Range 4, East, except 35 acres of land more or less, and being a part of the premises purchased by William Smith of David Hull."

From the time of the death of Jonas Priser, until on or about February 1, 1937, John Priser actively operated the real property listed, as a profitable farm. For many years, John Priser kept the minute details of the operation of the farm in a diary, recording transactions for feed, grain, tools and supplies. Assisting him in the operation of the farm were Mr. and Mrs. John C. Bowser, whose family had owned and operated a neighboring farm for some 60 years. On or about February 1, 1937, John Priser entered the Good Samaritan Hospital, Dayton, Ohio, for a prostate gland operation. While in the hospital, both Mr. Priser's daughter, Ruth Biddle, the plaintiff-appellant; and John and Ida Bowser, the defendant-appellees; visited Mr. Priser. In spite of the fact that Mr. Priser had run an abnormal temperature on February 22, 1937, and the fact that he had suffered two seizures of what appeared to be epilepsy while staying in the hospital, Mr. Priser was allowed to leave the hospital on February 23, 1937. The hospital records do not disclose that Mr. Priser's discharge was approved by a physician, or any of his relatives, but only by a nurse. The Bowsers took Mr. Priser from the hospital, in this condition, to the Bowser home, where he was immediately placed in bed to continue his recovery.

Sometime after this, Mr. Priser was up and around, however, the exact date that he arose from his sick bed is unknown to appellant. Less than eight weeks from the time that he left the hospital, to wit, April 14, 1937, a deed was executed transferring ownership of the Priser farm to the Bowsers, at least on its face. Present at the time of the alleged execution of the deed were: Harriet Isabel Shank, (nee Fleagle); Ida Bowser; John C. Bowser; and Carrie Tucker. Carrie Tucker was a Notary Public and notarized the deed. The transaction allegedly transpired at the residence of Carrie Tucker, who lived in Brookville, Ohio. After the alleged execution of the deed, John Priser never informed any of his kin about the conveyance of the prop-

erty. No mention was ever made of the conveyance in the daily diary kept by Mr. Priser.

John Priser died on November 24, 1944. On November 30, 1944, after going through the personal papers of the decedent, and learning the circumstances surrounding the execution of the deed, Ruth Biddle, Mr. Priser's daughter, administratrix of his estate and sole surviving heir, filed suit in the Court of Common Pleas, Montgomery County, Ohio, as the administratrix of this estate, against John C. Bowser, the putative grantee of the deed from John Priser. Ida Bowser was later added as a defendant. In her Petition for First Cause of Action, Case Number 95192, the plaintiff-appellant contended the stated consideration for the deed of April 14, 1937, from Priser to Bowser, was inadequate and that Priser's mind was affected at the time of the deed. At trial, on June 11, 1945, testimony was introduced that the deed was recorded, on April 15, 1937, in Deed Book 808, Page 42. The documentary tax stamps borne by the deed had been cancelled, using the initials "J.C.B.", which are the initials of John C. Bowser, the grantee, rather than the initials of John W. Priser, the grantor. Further disclosures made to the plaintiff-appellant from the Montgomery County records established the fact that John W. Priser and his wife, Mary Elizabeth Priser, were never divorced. Mr. Priser had, all his life, contended that he had remained married to Mary Elizabeth Priser, and thus the description of John W. Priser, Grantor, as "unmarried" on the questioned deed is inaccurate, and would not be acceptable to Mr. Priser as a proper description of his marital status at the time of the alleged execution of the deed.

On the facts presented at trial, the Common Pleas Court found: (1), there was no misrepresentation of the facts by the defendants and no influence exerted to induce the conveyance, in spite of testimony introduced by plaintiff-appellant to the contrary, summarized above; (2) that Mr.

Priser was not of unsound mind at the time of the conveyance, so that adequacy of consideration was not material.

On appeal, the Second District Court of Ohio, on April 26, 1951, affirmed the judgment of the Court of Common Pleas of Montgomery County, Ohio. However, for reasons unbeknownst to the plaintiff-appellant, no judgment entry was ever filed in the Second District Court of Appeals affirming the judgment.

Case Number 109402, filed January 26, 1956, was an action to impress a trust on the property conveyed by Priser to Bowser. During trial, the Common Pleas Court permitted an amendment of the petition to conform to evidence of a forgery of the signature of John W. Priser to the deed. Thus, to present proof of the elements of forgery, the plaintiff-appellant secured a certified photostatic copy of the deed recorded in Deed Book 808, Page 42, dated April 14, 1937, for examination by qualified handwriting experts. From known and unimpeachable sources, the plaintiff-appellant secured all of the *bona fide* examples of the writings and especially the signatures of her father, the later John William Priser. The normal standards of these writings and signatures were submitted as Plaintiff's Exhibits 3, 4, 5, 17 and 18. These standards were compared to the signature which appears on the deed recorded in Deed Book 808, Page 42, County Recorder's Office, Montgomery County, Ohio. Three of the leading and highest qualified handwriting experts in the United States made the same determination, that the signature affixed to the deed was not affixed by John W. Priser, owner of the two parcels of land that it purports to convey. One of these experts, Mr. Morris Nernberg, was injured in an auto accident and could not appear at the trial. Mr. Hugh L. Leggett, Sr., and Charles A. Appel, Jr., made appearance and their testimony is on record. Both of these experts testified that the deed recorded in Deed Book 808, Page 42, is forged. The entire transcript of testimony in

Case Number 95192 was admitted in evidence in Case Number 109402.

In its decision, the Court of Common Pleas, in Case Number 109402, held: (1), the decision of the court in Case Number 95192 precludes a finding of a constructive trust; (2), there is no evidence of any agreement to engraft a parole express trust; (3), a certificate of acknowledgment on a deed, in the absence of fraud, is conclusive evidence of the facts therein; and (4), the evidence of genuineness of a signature outweighs the handwriting experts' testimony of forgery.

Judgment entry, filed March 6, 1964. Plaintiff-appellant then raised the issues numbered one and two that are part of the appeal to this court, in her Bill of Exceptions, filed April 23, 1965. In discussing these issues, the Common Pleas Court of Montgomery County, Ohio, in its judgment entry, dated March 6, 1964, stated:

> "The court further finds that in view of all of this positive evidence that John W. Priser sold his farm to John Bowser, it would be impossible as a matter of law or fact, to make a Finding that the signature of John W. Priser was a forgery, based only on the evidence of the handwriting experts."

An appeal was taken from this decision to the Second District Court of Appeals, Ohio, Appeals Case Number 2950. A motion was filed at this time, in the Court of Appeals, to introduce additional testimony. This motion was allowed and additional evidence of forgery and an economic analysis of John W. Priser's financial affairs were then introduced.

On March 6, 1967, the Court of Appeals released its opinion in Case Number 2950, holding for the defendant-appellees, primarily on the ground that the plaintiff-appellant had failed to establish her case by clear, certain and conclusive evidence, stating on pages 21 to 23 of the opinion:

"The next question to be determined is whether the

signature of John W. Priser on the deed in question is a forgery.

"The certificate of acknowledgment attached to the deed was executed by Carrie E. Tucker, deceased, who signed also as a witness. The acknowledgment recites that: 'State of Ohio, Montgomery County, SS: On this 14th day of April, A. D. 1937, before me, a Notary Public in and for said County, personally came John W. Priser, the grantor in the foregoing deed, and acknowledged the signing thereof to be his voluntary act and deed.' The other witness signing the deed was Isabel Fleagle.

"A certificate of acknowledgment is conclusive evidence of the facts therein stated, in the absence of fraud. Two handwriting experts have testified that John W. Priser did not affix his signature to the deed and that the signing of his name thereto is a forgery. The evidence places Priser in Brookville on April 14, 1937, in the office of Carrie Tucker where the deed was executed. Ida Bowser testified that she saw Priser sign the deed. Isabel Fleagle Shank, who signed the deed as a witness, testified that she saw a small elderly gentleman affix the signature of John W. Priser. Priser is described in the evidence as a small elderly man. She further testified that she worked in an office adjoining the office of Carrie Tucker and had witnessed the signing of a number of documents at her request. She stated that 'Mrs. Tucker would call me into the office, introduce me to the person, and I would see the signature.' She further stated that the procedure in this case was the same as in the others.

"Forgery of a deed is generally defined as the false making of the instrument or the making of a material alteration in it with intent to defraud. 17 Ohio Jurisprudence (2d), Deeds, 182, Section 77.

"The signature of the grantor, though essential to a valid deed, need not be in the grantor's handwriting. 17 Ohio Jurisprudence (2d), Deeds, 125, Section 22.

"Throughout this case and the former case, the foundation of Appellant's claim is that John C. Bowser and Ida Bowser, his wife, perpetrated a fraud upon Priser. There is no evidence in this case tending to show that

either of the Bowsers affixed Priser's signature to the deed with intent to defraud him. For all we know, Priser may have authorized Mrs. Tucker or one of the Bowsers to affix his signature.

"The evidence here is insufficient to prove that a fraud was perpetrated upon Priser and that Priser's signature is a forgery. In the absence of fraud, it must be presumed that the signature is his acknowledged signature."

Plaintiff-appellant then filed a motion (Appendix Page A-54) for reconsideration with the Court of Appeals, Second Appellate District, on June 23, 1967. At the time of filing, plaintiff-appellant was proceeding without counsel, due to a disagreement between the family lawyer and the trial counsel as to the best method of proceeding. In spite of the fact that plaintiff-appellant was proceeding with this handicap, and so informed the court of this fact in her memorandum supporting the motion, the Court of Appeals denied the motion for reconsideration, on the narrow ground that it was not filed within the time allowed by Section 2505.071, Revised Ohio Code. (Decision on Motion, Dated August 22, 1967.)

Plaintiff-appellant then filed her Notice of Appeal to the Supreme Court of Ohio, in the Court of Appeals, Montgomery County, Ohio, 8:20 A. M., September 22, 1967, alleging that the appeal is on questions of law and involves a substantial Constitutional question. Plaintiff-appellant's characterization of the questions presented on the appeal to the Supreme Court of Ohio was:

1. What weight should be given to handwriting expert testimony in a case where the genuineness of the signature of a grantor, appearing on a deed, is disputed by the only heir of the grantor and a logical inheritor of the property, and contradictory proof of the authenticity of the signature is offered by testimony of the grantees, strangers to the grantor, who claimed to be present at the time of the signature?

2. When it is in the public interest of the citizens of the State of Ohio to have prompt adjudication of conflicting claims to property within the state, and certainty of title ownership of real property is desirable, for the same reason, is a county common pleas court acting against the public interest when, as a result of its delay in adjudicating conflicting claims to the property, the title is held in abeyance for an undue length of time?

The mandate of the Supreme Court of Ohio, dismissing the appeal in this case, was entered in this cause on December 13, 1967. Further, the Final Order of the Supreme Court of Ohio, denying a rehearing in this case, was entered in this cause of January 17, 1968.

THE QUESTIONS ARE SUBSTANTIAL

The Ohio State Constitution, Article 11, Section 39, provides that laws may be passed for the use of expert witnesses in criminal matters. Pursuant to this authority granted under Article II, Section 39, the State of Ohio has enacted a code provision allowing the use of expert witnesses in criminal insanity matters. Baldwin's Revised Ohio Code, §2945.40 (Third Edition, 1964). In addition, the Ohio code allows the admission of written reports prepared by an expert, evidently in both civil and criminal matters, and under this provision, obviates the necessity of the expert himself appearing in court. Baldwin's Revised Ohio Code, §2317.36 (Third Edition, 1964). However, the Ohio constitution and the codification of the law of the State of Ohio is silent with regard to any other matters touching on expert witnesses or expert testimony.

In the case which is the basis of this appeal, testimony of handwriting experts was extensively employed by the appellant. The courts of the State of Ohio have not favored the use, nor have they been accustomed to attaching much weight, to such testimony. *Bell* v. *Brewster,* 10 N. E. 679, 44

Ohio St. 690, 17 Wkly. Law Bull. 198 (1887) is typical of the approach taken by the Ohio courts, even to this date. The judgments of the Court of Appeals of Montgomery County, Ohio, and the Supreme Court of Ohio, which in effect, rejected the expert testimony, complied with the letter of the law of Ohio, as interpreted by the courts of that state. However, appellant contends that the spirit of the law was not sufficiently appreciated by either of the courts, for the circumstances of appellant's case were all but ignored, resulting in a rigid application of the case law to the facts of this case.

1. Appellant's use of handwriting expert testimony was the most practical and effective device for her purposes here. This is pointed up by the fact that the alleged signatory grantor of the deed in question was deceased; in addition, the other witnesses to the transaction were either unavailable, deceased or adverse to appellant's interest in the real property. Forced into this position by the circumstances of her case, therefore, appellant resorted to the one scientific device which has found gradual acceptance in many trial courts throughout the United States. *O'Connor* v. *Slaker*, 105 Neb. 88, 179 N. W. 401, 12 A. L. R. 199 (1920); *Marden* v. *Dorthy*; 160 N. Y. 39, 54 N. E. 726 (1899); *Boyd* v. *Gosser*, 82 So. 758, 6 A. L. R. 500 (Florida, 1918).

The handwriting experts employed by appellant are, without a doubt, two of the leading men in their field in the United States. Charles Appel's qualifications, (Record Page No. 27, 28) were included in the record before both courts. His national reputation as a questioned document examiner is enhanced by his service with the Federal Bureau of Investigation. Hugh Leggett, Jr., is a prominent questioned document examiner whose qualifications, in the record, Page No. 1, 2, speak for themselves.

Disregarding not only the detailed analysis of these experts, but more important still, the circumstances surround-

ing the execution of the deed, the Ohio courts have, to date, denied appellant due process of law. The cases decided by this court proceed upon the theory that given a court of justice which had jurisdiction and acts not arbitrarily but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. *Jordan* v. *Massachusetts,* 225 U. S. 167, 56 L. Ed. 1038, 32 S. Ct. 651 (1911); *Standard Oil Company* v. *Missouri,* 224 U. S. 270 (1911).

The evidence given by the two distinguished handwriting experts in this case is far more substantial, and is entitled to considerably more weight than afforded it in the Ohio courts. As a matter of fact, the character and effect of the evidence presented by the appellant is so positive, so persuasive, that to ignore its full weight and effect is to deny appellant due process of law because of arbitrary action by the lower Ohio courts.

This court long ago held, in the celebrated case of *Throckmorton* v. *Holt,* 180 U. S. 552, 569, 21 S. Ct. 474, 491 (1900):

> "An expert in regard to handwriting is one who had become familiar with the handwriting of the individual in regard to whom the question is raised. Handwriting is a physical matter, and does not itself represent any characteristics of the writer as to composition or general style, or as to his literary or legal attainments. It is to be seen and the characters recognized by the eye."

There have been, since that case, a great many refinements in the procedures of handwriting experts, such as: analysis of ink and paper used through precise chemical tests; enlargement and comparison of known writing samples with samples questioned as forged; analysis of the physical handwriting style and habits of the individual developed over a lifetime. Lacy, *Opinion Evidence or Facts?*

23 Wash. & Lee L. Rev. 12 (Spring, 1966). Both handwriting experts in this case used many, if not all of the methods described above.

2. This court has frequently referred to both the equal protection clause and the due process clause in discussing the constitutionality of statutes, e. g., *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. Ed. 923, 5 S. Ct. 357 (1884). When a state constitutional provision is questioned in the light of these two clauses, this court has scrutinized how the provision of the constitution affects the rights of the citizens coming within the purview of the provision or statute *vis-à-vis* other citizens similarly situated. Thus:

> "All persons should be equally entitled to pursue their happiness and acquire and enjoy property; they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition . . ." *Id* at 31, 28 L. Ed. at 925.

Appellant contends that the failure of the constitution of the State of Ohio to provide for the use of expert witnesses in civil trials has resulted in a patchwork application of expert testimony in civil cases. Thus in a recent case before the Supreme Court of the State of Ohio, *McKay Machine Company* v. *Rodman*, 11 Ohio St. 2d 77 (1967), the court placed great reliance on the testimony of an expert welder to fortify its holding:

> "1. In all proceedings involving matters of a scientific, mechanical, professional or other like nature, requiring special study, experience or observation not within the common knowledge of laymen, expert opinion testimony is admissible to aid the court or the jury in

arriving at a correct determination of the litigated issue.

"2. The art of welding is a subject the nature of which is not within the common knowledge of laymen, and the testimony and opinion of an expert witness on this subject is admissible.

"3. Expert opinion testimony is admissible as to an ultimate fact without infringing the function of the jury, if the determination of such ultimate fact requires the application of expert knowledge not within the common knowledge of the jury. (Ohio Supreme Court Case No. 40497)."

More important to the appellant, however, is the fact that when the issue of forgery is raised in a criminal proceeding, the Ohio courts resort to the use of handwriting experts to allow the state to prove its case. *Counts v. State,* (App.) 31 L. R. 327 (1930). Appellant contends that the issue of forgery should not be treated differently depending on whether the state or a private litigant is the complaining party.

3. It is a fundamental and universal rule of law, in all of the United States, that the title to real property must be certain and that any claims beclouding the title should be promptly adjudicated between the claimants. That this is the rule in the State of Ohio is certain, without further reference to statutory or case authority, other than the Ohio Constitution. Ohio Const. Art. I, 16 (1912). Both the Bowsers and the Biddles were thus entitled to have their conflicting claims to the property 'administered without denial or delay.' *Ibid.* Further, 'Due course of law,' in the Ohio constitution, Article I, 16, is the equivalent of 'due process of law' in the federal constitution. *In re Pollak,* 89 Abs. 112, 182 N. E. 2d 69 (1962).

However, in this case, the title to the John Priser farm was in a state of flux from the time of filing plaintiff-appellant's Petition for First Cause of Action, in Case Number

95192, November 30, 1944, to September 11, 1967, the date of filing of the Judgment Entry of the Court of Appeals of Montgomery County, Ohio, deciding plaintiff-appellant's appeal from an adverse decision of the second case filed by her in the Court of Common Pleas for Montgomery County.

Plaintiff-appellant alleges that the failure of the Court of Appeals for Montgomery County to ever file a judgment entry, recording its decision in case number 95192, which it decided on April 26, 1951, is a denial of due process of law or due course of law to the plaintiff-appellant. This is a denial to the plaintiff-appellant because, in both case number 95192, and the appeal stemming from it, appeal number 1899, the defendant-appellee prevailed. However, neither defendant-appellee nor his counsel took steps to finally put the matter to rest, that is, to ensure that a judgment entry was filed for appeals case number 1899.

4. Further, the Federal Supreme Court may consider jurisdiction over an appeal from a decision of the highest court of the state in which the question was treated as properly raised and was passed upon adversely to the claim of unconstitutionality, although the record fails to show that constitutional objections to a statute were properly raised in the trial court. *Whitfield* v. *Ohio,* 297 U. S. 431 (1935). In the instant case, the constitutionality of the Ohio courts' action was not raised in the trial court. However, it was not raised by appellant until she filed her memorandum in support of jurisdiction in the Supreme Court of Ohio for a specific reason: Additional testimony was submitted to the Court of Appeals of Montgomery County, Ohio, in February 22, 1966. It was therefore not until Judge Sherer of the Court of Appeals of Montgomery County, Ohio, ruled adversely to the cumulative weight of all of the testimony introduced by plaintiff-appellant, both at the trial level and when first introduced into the case in February, 1966, that the plaintiff-appellant could affirmatively state that the ap-

peal in her case was matured and ripe for appeal to this court.

It is therefore submitted that the decision of the Supreme Court of Ohio fails to recognize the seriousness of the errors committed by the inferior courts of that state. The errors committed by those courts are so fundamental to appellant's rights as a citizen of the State of Ohio and the United States that she deems them worthy of consideration by this court.

Respectfully submitted,

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APPENDICES

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1967 *TERM*
To wit: December 13, 1967

Ruth E. Biddle, Admrx.,
Plaintiff-Appellant,

vs.

Ida Bowser et al.,
Defendants-Appellees.

No. 41273
MANDATE

To the Honorable COMMON PLEAS COURT *Within and for the County of* MONTGOMERY, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

THOMAS L. STARTZMAN,
Clerk

_____ *19*

_____

_____ *Deputy*

APPENDIX A

RECORD OF COSTS

Docket Fee . . . . $20.00 *Paid by* Clarence J. Stewart
Docket Fee . . . . $ ..... *Paid by* .....
Docket Fee . . . . $ ..... *Paid by* .....
Printing Record . . . $ ..... *Paid by* .....
Supplemental Record . $ ..... *Paid by* .....
Sheriff's Costs . . . $ ..... *Paid by* .....
Sheriff's Costs . . . . $ ..... *Paid by* .....

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

1968 *TERM*

To wit: January 17, 1968

Ruth E. Biddle, Admrx.,
Plaintiff-Appellant,

vs.

Ida Bowser et al.,
Defendants-Appellees.

No. 41273
REHEARING

It is ordered by the court that rehearing in this case is denied.

I THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit from Journal No. ..... *Page* .....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 17th *day of* January, 1968.

THOMAS L. STARTZMAN, *Clerk.*
By ..... *Deputy.*

APPENDIX B

Ohio Const. Art. I, §16:

"All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner as may be provided by law. (Adopted September 3, 1912)."

Ohio Const. Art. II, §39:

"Laws may be passed for the regulation of the use of expert witnesses and expert testimony in criminal trials and proceedings. (Adopted September 3, 1912)."

Ohio Rev. Code, §2317.36 (Third Edition, 1964):

Admissible Reports. "A written report on findings of facts prepared by an expert who is not a party to the cause, nor an employee of a party, except for the purpose of making such report or finding, nor financially interested in the result of the controversy, and containing the conclusions resulting wholly or partly from written information furnished by the cooperation of several persons acting for a common purpose, shall, in so far as the same is relevant, be admissible when testified to by the person, or one of the persons, making such report or finding without calling as witnesses the persons furnishing the information, and without producing the books or other writings on which the report or finding is based, if, in the opinion of the court, no substantial injustice will be done the opposite party."

Ohio Rev. Code, §2945.40 (Third Edition, 1964):

Expert Witnesses in Insanity Cases. "In any case in which insanity is set up as a defense, or in which present insanity of the accused is under investigation by a court

APPENDIX B

or jury, the court may commit the defendant to a local hospital for the mentally ill, or the Lima state hospital, where the defendant shall remain under observation for such time as the court directs not exceeding one month. The court may in such case appoint one or more, but not more than three, disinterested qualified physicians, specialists in mental diseases, to investigate and examine in the mental condition of the defendant and testify as experts at his trial or other hearing. In case of such appointment, the court shall forthwith notify counsel of the names and addresses of the persons so appointed. The expert witnesses appointed by the court may be called by the court and shall be subject to examination and cross-examination by the prosecuting attorney and counsel for the defendant. The appointment of such witnesses, and their testifying as witnesses, shall not preclude the prosecuting attorney or defendant from calling other witnesses to testify on the subject of insanity. Such persons so appointed may be required by the court to prepare a written statement under oath, concerning the mental condition of the defendant, and file the same in the case. Such report shall not be read as evidence, except that it may be used by either counsel on the cross-examination of the witness who signed the same. The court shall instruct the jury in case of such appointment and testimony of such expert witnesses, that the credibility of such witnesses, in common with all other witnesses in the case, is for the exclusive consideration and determination of the jury. Persons so appointed shall be paid a reasonable fee for their examination or service and their reasonable expenses, the amount whereof shall be certified by the judge or court making the appointment and paid by the county."

Ohio Rev. Code, §2505.071 (Third Edition, 1964):

"Application for reconsideration of any cause or motion

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submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court in writing, and filed with the clerk for journalization or within ten days after the announcement of the Court's decision, whichever is the earlier. If an application for reconsideration has been filed within such time, the court shall not journalize the order or judgment until such application has been disposed of. No oral argument of an application for reconsideration shall be permitted except at the request of the court on its own motion."

SUPREME COURT U. S.
NOV 5 1968
CLERK

No. [redacted] 19

IN THE

Supreme Court of the United States

RUTH E. BIDDLE, *Administratrix, Appellant*

v.

IDA M. BOWSER, *et al., Appellees*

PETITION FOR REHEARING ON APPEAL FROM THE SUPREME COURT OF OHIO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 41273

RUTH E. BIDDLE, *Administratrix, Appellant*

v.

IDA M. BOWSER, *et al., Appellees*

PETITION FOR REHEARING ON APPEAL FROM THE SUPREME COURT OF OHIO

To the Honorable Chief Justice, and the Associate Justice of the Supreme Court of the United States:

Comes now the petitioner and presents this petition for a rehearing on the appeal from the Supreme Court of Ohio filed in this case.

JURISDICTION

The appeal was filed on May 29, 1968, and denied on October 14, 1968. This petition for rehearing is filed within twenty-five day from October 14, 1968, in accordance with Rule 58 of this Court.

REASONS FOR PETITION FOR REHEARING

In applying for this rehearing, your petitioner reiterates

each and every ground set forth in the original petition, and further suggests to the Court the matters hereinafter discussed.

Since the filing of the appeal by Ruth Biddle, in this Court, a petition for a writ of certiorari to the Supreme Court of Pennsylvania, in a case entitled *Mary Townsend Cochran* v. *George L. Morris and Girard Trust Bank, et al.*, petition for cert. filed, 37 U.S.L.Week 3115 (U.S. August 20, 1968) (No. 422). The *Cochran* case, involving a contested will and intervivos trust, is presently before this Court for decision, on the petition of the parties who were, up to a certain time in the life of the testatrix and settlor, to wit, February 20, 1964, the legatees and beneficiaries under the successive wills and the trust instrument. However, after February 20, 1964, petitioner and her issue were virtually disinherited as she and her husband received but relatively small bequests. *Id,* Petition for Cert., Page 5.

Inherent in the resolution of the *Cochran* case, as is inherent in the instant case, is a proper evaluation of the known and the questioned signatures of the testatrix, or in the *Biddle* case, the testator, on the various instruments. When the petitioner in that case employed the use of scientific, expert handwriting testimony, the Orphans' Court of Montgomery County, Pennsylvania, (sustained by the Pennsylvania Supreme Court) held it: " - - to be entitled to little or no weight in view of direct testimony of decedent's execution thereof by witnesses found credible by the trial court." Id, at 14.

These two cases therefore present a clear indication of the inconsistent application of the rules of evidence in the States of Ohio and Pennsylvania, depending on whether the State or a private individual is the movant. Mr. Wigmore, in his treatise on evidence, succinctly states:

"It ought to be now well understood that the identification and the decipherment of documents, including hand-

writing and all other features, are the subject of scientific study, made by the aid of instruments of precision, and that modern research has elevated the whole subject into the realm of an applied science. Under such conditions, tangible reasons can be given for every opinion, precisely as an engineer can explain the reasons for constructing a bridge of a certain type. See Albert S. Osborn, *Reasons and Reasoning in Expert Testimony,* Law and Contemporary Problems: Expert Testimony, Duke University, 1935, p. 488. Such an opinion is as much more valuable that the untrained layman's opinion as that of a scientific and experienced geologist surpasses that of the empiric oil-prospector." 7 Wigmore, Evidence § 1998 (Third Edition, 1940).

Professor Wigmore, in an exhaustive survey of the use of handwriting expert testimony in the state court of the United States, concludes that the decisions and the statutes in the various jurisdictions exhibit a great variety of rules; even within the same jurisdiction, there is often obscurity and inconsistency. *Id* § 2008. In his survey, which is approached from the standpoint of whether such testimony is admissible at all, and, if so, for what classes of writings, he concludes that the various jurisdictions fall into the following categories, based on a summation of Sections § 2008 and § 2016 of his treatise by the attorney for the petitioner:

Jurisdiction	Type of Writing and Case	Admissible or Not Admissible
United States: Federal	Appearance bond in criminal case	Admissible
Twenty-Nine States: California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New	Any writing, case	Yes, provided document is proved to be genuine to the satisfaction of court

York, North Carolina, Oregon, Rhode Island, Tennessee, Texas, West Virginia, and Wisconsin.	
Three states: Massachusetts, Pennsylvania and Vermont	Preliminary corroboration required before expert and jury are allowed to compare writings.
Four states: North Dakota, South Carolina, South Dakota, and Utah	In these states, the use of such testimony is employed on a case by case basis.
Ohio	Here no distinction is taken between the expert's and jury's use of specimens, and the same rule is laid down for both.

It is clear from an analysis of Professor Wigmore's treatment of the subject that the State of Ohio has been, and is now, so out of step with the times by its application of the law in this area of the field of evidence, as to deprive appellant-petitioner Ruth Biddle of her property without due process of law.

Further, with the pendency of the *Cochran* case now before this Court, the court now has the opportunity to establish a modern and sensible approach to this most important aspect of the law of evidence.

Petitioner-appellant Ruth Biddle contends that, in view of the important question posed by her own case and that of the *Cochran* case, showing the uneven application of the laws of evidence in the two states, depending on whether a civil or criminal matter is involved, sets the stage for this Court to grant jurisdiction to her appeal. Further, she contends that the filing of the *Cochran* case in this Court is a circumstance of so substantial and controlling an effect, that she is entitled to a rehearing of the judgment of this Court denying her appeal. *Sanitary Refrigerator Company v. Winters*, 280 U.S. 30, 34, footnote 1, 50 S. Ct. 9, 10 (1929);

Massey v. United States, 291 U.S. 608, 54 S. Ct. 532 (1933). For only by granting her appeal can this Court exercise proper supervisory powers over state courts and ensure an even and fair application of the laws of evidence in those courts. Further, petitioner-appellant contends that the above matters are so substantial that she should be given an opportunity to present them to this Court at her rehearing.

CONCLUSION

For the foregoing reasons, the petitioner respectfully urges that a rehearing be granted, that upon further consideration that the order of October 14, 1968, denying the appeal, be revoked, and that the appeal be granted or that a writ of certiorari issue.

DOWNEY RICE
Attorney for Petitioner

I, Downey Rice, of counsel for the petitioner, Ruth Biddle, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay. Further, I hereby certify that the petition for rehearing is restricted to the grounds above specified.

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SUPREME COURT OF THE UNITED STATES

October Term, 1968.

BIDDLE *v.* BOWSER ET AL.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 159. Decided October 14, 1968.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.